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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 154

CHRISTIAN A. JOHNSON AND CAMERON BIEWEND INDIVIDUALLY AND AS A COMMITTEE OF THE COMMON STOCKHOLDERS OF ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

v.

SECURITIES AND EXCHANGE COMMISSION

AND

ELECTRIC POWER AND LIGHT CORPORATION,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PRESS OF GEO. H. DEAN CO., BOSTON

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Petitioners.

v.

SECURITIES AND EXCHANGE COMMISSION

AND

ELECTRIC POWER AND LIGHT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Christian A. Johnson and Cameron Biewend, individually and as a Committee for the common stockholders of Electric Power and Light Corporation (called in this Brief the "Committee") pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit (R. 305), which was entered on February 25, 1954, rehearing denied March 23, 1954 (R. 317), affirming that portion of a plan of reorganization approved by the Securi-

ties and Exchange Commission (called herein the "Commission") allowing in part and disallowing in part an Application of the Committee for the allowance of fees and reimbursement of expenses in the reorganization of Electric Power and Light Corporation.

Opinions Below.

The opinion of the Commission below is *In the Matter of Electric Power and Light Corporation* et al. H.C.A.R. No. 11175, decided April 21, 1952 (R. 212a). The District Court's opinion (R. 288a) is unreported and did not discuss the claim of the Committee. The opinion of the United States Court of Appeals for the Second Circuit is *In re Electric Power and Light Corporation* 210 F. 2d. 585, decided February 25, 1954. (R. 305). The opinion of the Commission which approved the original Plan of Reorganization, from which the Applications for fees arose, is *In the Matter of Electric Power & Light Corporation* H.C.A.R. No. 8889 (Unprinted Record, Vol. I, p. 98), March 2, 1949.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 25, 1954, and rehearing denied March 23, 1954. The jurisdiction of the Supreme Court is invoked under Section 11 of the Public Utility Holding Company Act (15 U.S.C. Sec. 79K) and under 28 U.S.C. Secs. 1254 and 2101.

Questions Presented.

The questions presented involve fees of a Committee's expert and counsel for services in connection with a corporate reorganization under the Public Utility Holding Company Act. The Committee was duly organized under the Rules of the Commission; it represented a large propor-

tion of common shareholders, was the sole representative of the common in all aspects of the case and was the sole party opposing the Plan of Reorganization and presenting an alternative Plan. The questions presented are:

1. Whether compensation can be denied, (or, as the case may be, disallowed in all but nominal amount) to such a Committee primarily or solely on the ground that the Committee was unsuccessful in changing the Plan of Reorganization and therefor did not "benefit" the estate or its shareholders.

2. Whether adherence by the Securities and Exchange Commission to the so-called "benefit rule" in passing upon fees of such a Committee is consistent with the "fair and equitable" standard of Section 11 of the Public Utility Holding Company Act.

3. Whether compensation should be allowed to such a Committee where the facts show: (a) that the presentation of the Committee was a competent and reasonable one and raised *bona fide* issues of fact and law and (b) that, many years after consummation of the Plan of Reorganization, the contentions of the Committee have been borne out, whereas the findings of the Commission have proved to be demonstrably in error in nearly all important respects.

Statute Involved.

The provisions of Section 11(e) of the Public Utility Holding Company Act of 1938 (28 U.S.C. Sec. 79K (e)) are set forth in Appendix B.

Statement.

The fees sought by the Committee are for services of its expert witness and counsel arising from a plan of reorganization of Electric Power & Light Corporation which as approved by the Commision resulted in the liquidation of the Company and in the creation of a new Holding Com-

pany System, *In the Matter of Electric Power & Light Corporation* Holding Company Act Release No. 8889 (referred to as "Opinion re Plan") (Unprinted Record Vol. I, p. 98). Briefly summarized, the reorganization affected all classes of stock, which were as follows: (Opinion re Plan, p. 5. Unprinted Record Vol. I, p. 103).

$7.00	Preferred Stock	514,162 shares
$6.00	Preferred Stock	255,430 shares
$7.00	Second Preferred Stock	74,814 shares
	Common Stock	3,453,787 shares
	Warrants	534,754 warrants

The Company's balance sheet showed consolidated assets of $662,000,000. (Opinion re Plan, Unprinted Record, Vol. I, p. 201 Appendix A). The Plan adopted was filed in March 1948, after a prior plan which had been filed proved to be no longer feasible. All classes of senior shareholders and Electric Bond and Share, the parent Company, supported the plan except in certain minor respects (R. 222a). Only the common shareholders opposed the plan. Electric Bond and Share owned 57.23% of the common (R. 256a) but its interests were, by virtue of ownership of other stock and of substantial claims against Electric Power and Light, clearly in conflict with those of the common stock, as the Commission has stated (R. 255a-256a).

Under the circumstances the Johnson-Biewend Committee was the only party in the case opposing all phases of the Plan (R. 222a). Another Committee, the Sincoff Committee, who represented a private group of shareholders, participated in a limited portion of the case involving claims against Electric Bond and Share (R. 222a).

The appellant Committee filed a declaration under Rule U-62 of the Rules and Regulations of the Commission, which

governs and regulates the formation and activities of shareholders' Committees, and was authorized to function by the Commission. The Committee, with the approval of the Commission, solicited authorizations from common shareholders and ultimately represented approximately 400,000 common shares of a total of 1,477,149 shares in the hands of the public (excluding shares held by Electric Bond and Share) (R. 49a). The Committee was therefore the only group which represented a broad segment of publicly-held stock and was the only party representing a portion of the publicly-held common in all aspects of the case. It should be noted that the Commission had evaluated the common stock at $26.65 per share, or, with 3,453,787 shares of common, at approximately 90 million dollars (Opinion re Plan, P. 72 Unprinted Record, Vol. I, P. 170) However, as will be shown, the Commission's estimate is less than one-half of present values. It is therefore not a matter of dispute that the property values represented by this Committee were of considerable magnitude. The plan itself raised a number of questions of law and fact. The major dispute in the case was the proper allocation of securities to the holders of the preferred and common stocks and the option warrants. The latter raised a question of law which was later decided by this Court contrary to the holding of the Second Circuit. *Niagara Hudson v. Leventritt* 340 U.S. 336 (1951). The securities to be allocated consisted of shares of United Gas Corporation and of Middle South Utilities, Inc., which was a new Company organized to hold the common stock of Arkansas Power and Light Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Service, Inc. Subsidiary questions involved the necessity of creating a holding company, namely Middle South, for these operating companies and the pro-

priety of basing earnings estimates on a single year's budget. The second phase of the case involved the Deep Rock doctrine and the settlement of claims by the Company against Electric Bond and Share. The voluminous findings of the Commission reflected innumerable disputes of law and fact. (Opinion re Plan, Unprinted Record Vol. I, p. 98).

The Committee submitted an alternative Plan of reorganization which was rejected by the Commission. The Committee was unable to convince the Commission that the allocation of securities proposed by the Company was unfair to the common, that the creation of Middle South was unnecessary and that the settlement of claims was unduly low. When the plan was submitted to the District Court for approval and enforcement, the Committee again opposed it. However, that Court held that the Commission's findings were supported by evidence in the record and approved the plan (R. 41a). This plan was upheld by the Second Circuit Court in *In Re Electric Power and Light Corporation,* 176 F. 2d 687, after an application for a stay had been denied by the Circuit Court and the Supreme Court (by a 4-2 vote), *In Re Electric Power and Light Corporation,* 337 U.S. 904.

In December of 1949, after the conclusion of litigation, the Committee filed an Application on behalf of itself and other parties for Reimbursement of Expenses and Allowance of

Fees (R. 47a). The Fees and Expenses named therein were as follows (R. 48a):

	Fee	*Expenses*
Burns, Blake & Rich, Counsel	$35,975.00	$2,770.06
Expenses and Disbursements of the Committee. (This includes $5,000. paid to Becker, Berman & Odell as a fee and $1,049.79 for expenses and $2,734.58 paid to P. Harold Peterson on account.)		16,347.47
Additional Compensation to P. Harold Peterson	9,454.42	

No compensation was asked by appellants Messrs. Johnson and Biewend for their own services.

The Commission adopted the recommendation of the Company and allowed Burns, Blake & Rich only $9,500. instead of $35,975., which was requested, for legal services, plus reimbursement of expenses (R. 242a, 243a, 244a). The fee of P. Harold Peterson, the Committee's expert witness, was denied *in toto* (R. 244a-245a). The expenses of the Committee were allowed, except for payments to Peterson of part of his fee and except for payment of the fee of Becker, Berman & Odell, a New York law firm which had been engaged to represent the Committee before the United States District, Circuit and Supreme Courts (R. 245a, 246a). The District Court approved the Commission's allowance and disallowance of fees and overruled appellants' objections thereto, (R. 268a, 288a, 289a, et seq.). The Second Circuit affirmed (R. 305), and the Committee now seeks review by this petition for certiorari.

Specification of Errors.

The Court of Appeals for the Second Circuit erred:

1. In failing to apply a proper rule of law as applied to Compensation of experts and counsel of the Committee—namely, that allowance of nominal compensation or denial of compensation is not proper where the presentation of the Committee was competent and reasonable and where representation of shareholders was necessary.

2. In holding in effect that the primary basis of compensation of a Committee is its success in change of a Plan and in upholding the Commission's ruling that such success is the sole basis of compensation.

3. In failing to hold that the objections of the Committee made to the District Court should have been allowed. These objections were as follows (R. 286a):

> "1. Objection is made to disallowance by the Securities and Exchange Commission (hereinafter called S.E.C. or Commission) of the following fees for which application has been made to the Commission:
>
> | | *Fee* |
> |---|---|
> | Burns, Blake & Rich (Counsel for Committee) ..... | $26,475.00 |
> | Expenses and Disbursements of the Committee (in payment of $5,000 to Becker, Berman & Odell as a fee and $2,734.58 to P. Harold Peterson on account) ... | 7,734.58 |
> | P. Harold Peterson (Financial Expert for Committee) ..... | 9,454.42 |
>
> "2. Objection is made to the Finding of the Commission that the failure of the Committee to change any part of the Plan of Reorganization of Electric Power & Light Corporation finally approved is sufficient basis for disallowance of the fees of P. Harold Peterson entirely and disallowance of the major share of the fee of Burns, Blake & Rich.

"3. Objection is made to the retroactive change by the Commission of its pronounced policy of granting reasonable fees to committees performing competent work, regardless of any change in the final plan.

"4. Objection is taken to the failure of the Commission to consider the fact that the valuations of the Committee and its expert have now been proved to be substantially correct, while those of the Commission proved to be erroneous.

"5. Objection is taken to the following finding of fact of the Commission, as having no basis in the record:

> "* * * it is significant that the allocation proposals made by the Johnson-Biewend Committee would have resulted in the $7 Preferred Stock receiving securities and cash of a present value of between $85 and $95 in full compensation for their liquidation preference of $189 and the redemption price of $199." (R. 241a).

"6. Objection is taken to the finding that the work of the law firm of Becker, Berman & Odell resulted in duplication of services."

4. In finding that the Committee did not submit a Plan of reorganization to the Commission.

Reasons for Granting the Writ.

This case involves questions, never decided by this Court, and for many years a subject of division in the lower Courts, of importance not only in corporate reorganizations under Section 11 of the Holding Company Act but also in Reorganizations under Chapter X of the Bankruptcy Act (11 U.S.C. Ch. 10, Sec. 642). The problem presented by this case concerns the denial of counsel fees to a duly organized Committee, with wide and large representation among

shareholders, on the ground that the Committee was unable to effect changes in a Plan of Reorganization passed upon by the Securities and Exchange Commission. The question of law was intensely discussed at the time of the enactment of Chapter X of the Bankruptcy Act and the so-called "benefit" requirement was—despite the instant case—apparently rejected by the wording of Chapter X, although a minority of Courts have continued to follow it.

Although the question of the validity of the "benefit rule" is common to Chapter X reorganizations, it also is a problem under Section 11 of the Public Utility Holding Company Act. Section 11 (e) requires that a Plan of Reorganization be "fair and equitable", and the Commission's jurisdiction over fees must conform to this standard. *In Re Electric Bond and Share Co.,* 80F. Supp. 795. It is likely that the status of this rule as finally determined will be the same under both Chapter X and Section 11.

I.

The Commission and the Court below have applied in the case at bar the so-called "Benefit Rule" which conditions compensation either wholly or primarily upon successful litigation.

Certain salient facts stated above must be kept in mind in consideration of the questions of law presented.

First, compensation of the Committee's expert witness Peterson was denied *in toto.* Reimbursement of the Committee for fees paid to New York counsel Becker, Berman and Odell, for work in Court proceedings in the Second

Circuit and the Supreme Court were totally denied.[1] Compensation of its chief counsel Burns, Blake and Rich was allowed in nominal amount only.[2]

Second, the matters upon which the Committee's expert and counsel worked involved securities worth large sums

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[1] The Commission denied reimbursement to the Committee for fees paid to Becker, Berman and Odell on the ground that the latter firm's services were duplicative of the Committee's general counsel, John F. Rich of the firm of Burns, Blake and Rich. The services of Becker, Berman and Odell were in connection with Court proceedings in the District, Circuit and Supreme Courts. The Commission held that since Mr. Rich and Mr. Burns were partners in a law firm in New York, new counsel should not have been engaged. It was conceded that Judge Burns had done only a small amount of work in the case and that Mr. Rich's home and principal office were in Boston. Although the Committee deemed it necessary to engage counsel regularly practising in the Federal Courts in New York, the Commission held that this exercise of discretion was unwarranted and that Rich should have done the work by commuting from Boston to New York for the nominal fees allowed.

Presumably the Commission would not have denied this fee had the Committee been successful in the Courts. Such a ruling, which holds it improper for a Committee to engage a local lawyer familiar with procedures in a distant jurisdiction, is unduly harsh and is in error. This sort of stringent regulation of fees has recently been reversed by the Courts in cases where the Commission has reduced fees for duplication of work or for other reasons. *Standard Gas and Electric Company* v. *S.E.C.,* (C.C.A. 8, decided April 19, 1954.) Federal Securities Law Reporter Current Vol. p. 92,012; *Securities and Exchange Commission* v. *Masterson,* 202 F. 2d. 63, (C.C.A. 3, 1953) cert. denied 346 U.S. 818.

[2] The fee of Burns, Blake and Rich was $9,500. for total work of about 1800 hours (R. 242a) — a little over a year's work. This represents a fee of $5.29 an hour for this vital corporate work. After deducting office overhead costs (which would include secretary of $2.00 an hour, rent of at least $1.00 an hour, library, research assistance and other expense), the fee could not have amounted to $50.00 a week, if indeed it exceeded office costs. That this fee is nominal and far below usual standards of compensation for such work is obvious from the other fees approved below by the Commission — e.g. to Simpson, Thacher and Bartlett (R. 259a, 260a) $50 an hour; to Cahill-Gordon, Zachry and Reindl (R. 228a-230a) $34 an hour; and to Percival E. Jackson (R. 234a-237a) $28 an hour. These fees totaled respectively $35,000., $207,000. and $140,000.

of money. The interest of the common shareholders was found by the Commission to be worth over 90 million dollars, (Statement of Case, P. 5) and, as will be demonstrated, would now be worth about 180 million dollars.

Third, the Committee was the only party representing publicly held common stock or presenting a plan in its behalf, and the stock represented was a significant portion of the publicly held common.

Fourth, all classes of stockholders were in substantial support of the Plan except the common shareholders. As finally approved, the Plan was unfavorable to the common stock. (See *Sixth* below.) The Committee was the sole party to propose an alternative Plan.

Fifth, were it not for the activities of the Commission the common shareholders would have been unrepresented in consideration of the major phases of the Plan.

Sixth, the contentions of the Committee, although rejected by the Commission, have, many years after the consummation of the Plan, proved to be almost entirely correct, whereas the evaluation approved by the Commission has been in error and has resulted in a loss to the common stock of nearly one hundred million dollars. Although it is not deemed necessary to complicate this petition by submission of detailed computations, the result of the Commission's error in approving the Plan (which error must certainly rank as one of the most serious miscalculations ever made by the Commission) is shown for the Court's convenience by figures in Appendix A. These figures are current adjustments of figures submitted to both the District and Circuit Courts below. The accuracy of figures previously presented has never been challenged by the Commission. *These figures show that the Commission un-*

dervalued the equity of the common stock by about 90 million dollars and that the participation of the common stock should have been doubled by the Plan. The Committee pointed out to both the District and Circuit Courts that the Plan of Reorganization failed for the very reasons pressed by the Committee in opposition to the Plan and expressly rejected by the Commission. However, the Circuit Court did not consider whether the Committee's analysis was sound. The Court assumed *arguendo* that the Commission's approval of the Plan was a mistake but nevertheless dismissed the Committee's contention with the following odd conclusion, which begs the issue:

> "It is common knowledge that an intelligent estimate may turn out to be less accurate than an uninformed guess, and a comparatively higher ultimate accuracy of a rejected forcast does not necessarily show that it was a contribution of any recognizable value at the time it was made available". (R. 311).

The Court below therefor made no inquiry as to whether the Plan had failed for the reasons prophesied by the Committee or as to whether the failure of the Plan was due to fallacies in Commission analysis rather than those of the Committee. The Court made no inquiry as to whether the Committee's presentation was a reasonable and competent one.

The Committee had pointed out to the Circuit Court that its own plan of reorganization and the estimates of its expert witness Peterson, had been borne out by supervening events as fair and equitable. The Commission had made findings to the contrary (R. 241a) but its finding was the result of an arithmetic error (never denied by the Commission before the Courts). The Circuit Court compounded this error by stating that the Committee had never filed

a Plan for Reorganization! (R. 311). The Court did not correct this error even after it was called to its attention upon petition for rehearing (R. 314).

It is apparent in view of the foregoing that the Commission placed its disallowance of compensation almost entirely on the failure of the Committee to persuade the Commission to change the Plan of Reorganization.

Indeed, the Commission by express language adopted the so-called "benefit rule" in its opinion. In that portion of its opinion pertaining generally to fees, the Commission stated that the benefit conferred is the "primary factor" in allowance of compensation (R. 223a). This indeed was the view of the Second Circuit Court (R. 312). However, the Commission took an even more extreme view in discussing fees of the Committee's Counsel Burns, Blake and Rich. The Commission stated: (R. 243a).

> "Our allowance cannot be based upon the number of recorded hours of time attributed by counsel to the case. Efforts productive of significant results may occupy only a few hours, while on the other hand many days may be spent to no avail. *We can charge the estate only for the measure of benefit conferred upon it*" (Emphasis Supplied).

The language above clearly adopts the "benefit rule." Both the Commission and the Court have strayed far from applying a rule of law that would establish the reasonableness and competence of the Committee presentation and the necessity of stockholder representation as the primary basis of compensation.

II.

This Case, in adopting the "Benefit Rule" is in conflict with other Judicial and Administrative Precedents and is unsound.

The application of the "benefit rule" by the Commission in this case reflects a reversal of a long established position of the Securities and Exchange Commission. The new doctrine or approach of the Commission emphasizes the present state of uncertainty in the Courts. Although the Second Circuit Court has affirmed the Commission in the present case, its judgment is in conflict with a great many cases or precedents as shown by the following:

1. *In the Matter of Engineers Public Service Company* decided Nov. 30, 1953, 116 F. Supp. 930 (D.C. Del. 1953) (Appeal filed by the Commission to the Court of Appeals for the Third Circuit) has rejected the adoption of the "Benefit" Rule under the Holding Company Act. The *Engineers* case is very similar to the instant case. The applicants were attorneys representing common shareholders and had appeared after the management had acquiesced in a new plan by the Commission. Although the applicants successfully opposed the new plan in the lower courts, the United States Supreme Court finally upheld the Commission. *S.E.C. v. Central Illinois Corp.* 338 U.S. 96. Upon remand, the Commission refused to allow compensation to the applicants on the ground that no benefit had been conferred. Before Judge Leahy, who as Distrct Court Judge sitting in Delaware has passed upon a very significant percentage of all reorganization plans approved by the Commission, the Commission took the flat position that the applicants did not have the right "to require (all) common stockholders to pay for the minority's objections when it turns out that despite their good faith, despite their

reasons for believing that they were right, they were in fact wrong and the management which the common stockholders had elected was in fact right". Judge Leahy in a thoroughly documented and able opinion, rejected the Commission's position. He stated that it was "at loggerheads with previously announced principles governing allowances of compensation in reorganization under the Holding Company Act." (116 F. Supp. at 935). He further noted that the Commission's position is contrary to the prevailing view as stated in legal texts on Bankruptcy and to the Commission's own position on the matter in its reports to Congress.

2. *Conflict with established precedents before and after the enactment of Chapter X of the Bankruptcy Act including cases in various Circuit Courts.*

Collier on Bankruptcy states that compensation may be allowed to a Committee for reasonable though fruitless efforts in opposing a Plan or Reorganization. (*Collier on Bankruptcy,* 14th ed., Vol. 6, pp. 4507-8):

> "In addition, activities which benefit the estate are not to be restricted merely to those which relate to the successful consummation of a phase, as was largely the case under Section 77B. Activities relating to opposition to a plan, *either successful or unsuccessful,* are entitled to an allowance under Chapter X. This serves to insure the vigorous representation of all security holders and the protection of minority groups". (Emphasis supplied). . . ."

Again at p. 4537, Collier states:

> "Nevertheless, one thing should be clearly understood, and that is that activities in opposition to a plan *whether they are unsuccessful or successful* may be entitled to an allowance just as well as activities in support of the plan."

The question of compensation of counsel under the Bankruptcy Act is identical to that under the Public Utility Holding Company Act since there is a common objective of a "fair and equitable" plan. In *Heenehan v. Prudence Realization Corp.* 108F. 2d 103 (C.C.A. 2, 1940), the Second Circuit took a position contrary to its present position (although Judge Chase, who rendered the opinion in the case at bar, dissented in the *Heenehan* case and therefor remains consistent in his view that the "benefit" requirement is proper). In *Heenehan,* counsel had raised a question of constitutional law in a reorganization and had been overruled. The Second Circuit held that the question raised was a reasonable one and therefor merited compensation even though it had been pressed unsuccessfully. Judge Chase rendered a dissent (which seems to sum up his present position) in which he stated ". . . . it would be idle to suggest that the statute contemplates allowances for all such or for those attorneys who may by their services have helped to clarify the law. Where reliance must be only upon the general statutory provision, *the test should be one of benefit to the estate"* (Emphasis added). Cases which have rejected the "benefit rule" are *Milbank, Tweed & Hope v. McCue.* 111 F. 2d. 100 (C.C.A. 4, 1940) and *Smith v. Central Trust Co.* 139 F. 2d 733 (C.C.A. 4, 1944). To the same effect is *In re Inland Gas Corp.* 73 F. Supp. 785 and In re *N.Y. and H.R. CO.,* 46F. Supp. 214, 234. In the latter case Judge Hincks stated:

> "To be sure, their effort to develop a plan which should recognize some equity for the old stockholders proved unsuccessful. Nevertheless, lack of success in advocacy on such an issue is a factor affecting the amount rather than the propriety of compensation".

The above cases are in conflict with *Cook v. Bowerock* 122 F. 2d. 977 (C.C.A. 8, 1941) and the case at bar as

well as other decisions which cling to the outmoded concept of benefit. *Ritchie v. Flour Mills of America* 122 F. 2d. 986 (C.C.A. 8, 1941); *Watters v. Hamilton Gas Co.* 29 F. Supp. 436 (S.D.W.Va.) aff'd in part and reversed in part, 111 F. 2d. 100 (C.C.A, 4, 1940). These cases have been termed by Collier on Bankruptcy (Vol. 6, p. 4538, Footnote 30) as "erroneous".

3. *Prior Holdings of the Securities and Exchange Commission.* The Securities and Exchange Commission has vigorously opposed the "benefit" rule in the past, and contrary to its present position has correctly argued that the "benefit" rule is unsound.

In order to demonstrate the anomaly of the Commission's position on the "benefit" rule, it is necessary to review the background of the work of Committees in Bankruptcy cases prior to Chapter X. As noted by Collier, (Vol. 6, p. 4537 et. seq.) there grew up under the decisions before Chapter X the theory that benefit to the estate generally meant activities which related to the successful consummation of a plan. However, as noted, the Second Circuit had taken the contrary view in *Heenehan v. Prudence Realization Corporation* 108 F. 2d 103, (C.C.A 2, 1940).

The Commission took the position before Congress that this rule was entirely unsound, for the rule tended to discourage representation of public shareholder groups in reorganizations. Indeed, the Commission wrote what appeared to be an epitaph for the "benefit" rule when it condemned it unequivocably as one that "set up a punitive ideal that had no necessary relation to the realities of reorganization". *S.E.C. Reports on the study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees,* Vol. VIII (1940) P. 249. See also discussion at p. 249, et. seq. In-

deed, as a result of the Commission's pioneering, Section 242 of Chapter X of the Bankruptcy Act (11 U.S.C. Ch. 10, Sec. 642) was amended to provide that fees may be allowed "in connection with a plan approved by the Judge, whether or not accepted by creditors and stockholders or finally affirmed by the Judge. . . . ."

In the Engineer's case, Judge Leahy notes that the Commission is forthright in urging the "benefit" rule. The Commission stated in its brief that it never intended to "urge the abrogation of the general rule against compensating persons for non-beneficial services". That this is contrary to previous contentions made to the Courts and in its own decisions is pointed out by Judge Leahy. (See *In the Matter of Engineers Public Service Company,* 116 F. Supp. 930 at 935). The Commission took a contrary position in the following cases: *In re Northern American Light & Power Co.* 101 F. Supp. 931, at p. 933; *In The Matter of New England Power Association* H.C.A.R. No. 8751, December 27, 1945; *In the Matter of Midland Utilities Company* H.C.A.R. No. 8982. *Smith v. Central Trust Co.* 139 F. 2d. 733 (C.C.A. 4, 1944), *In re Inland Gas Corporation* 73 F. Supp. 785; *In the Matter of Philadelphia and Reading Coal & Iron Co.* 61 F. Supp. 120.

The reason for the amendment of the Bankruptcy Act and for the position formerly pressed by the Commission must be found in the mechanics of the Committee function in reorganizations and can be illustrated by the facts of the instant case.

A reorganization under Section 11 or Chapter X is always a long and intricate proceeding. Litigation often lasts for several years and results in bulky records of thousands of pages and hundreds of exhibits. For example, the record in this case dealing solely with the last plan filed was about six thousand pages long. There were several hundred ex-

hibits, nearly all containing financial statistics. Personnel must be highly trained and expenses of litigation are very high. The ordinary shareholder has not the wherewithal to be represented even though he may have an important financial stake in the outcome. It is for this reason that the highest public policy is reflected by the creation and participation of committees which represent and communicate with large numbers of shareholders. Both the Commission and Reorganization Courts have in the past welcomed the activity of Committees in order that all points of view shall be presented. To call the Committees volunteers is to do them an injustice, for it is unlikely that reorganization tribunals could properly function without the help of Committees. Members of these Committees functioning under the Holding Company Act are held to the highest fiduciary duties by the Commission, (Rule U-62, Holding Company Act Regulations, CCH Federal Securities Law Reporter, Col. 3, Par. 38, 724). Any policy in regard to allowance of fees that requires personnel to gamble all or nothing on reaching a correct result must seriously discourage shareholder participation. The logical result of the new severe policy of the Commission is to divest large groups of shareholders of representation.

III.

The Importance of the Question before the Court.

The status of the "Benefit Rule" should now be determined by this Court. Despite a somewhat battered history, it has nevertheless refused to die. As resurrected by the Commission, it will discourage representation of publicly held shares in reorganizations. It tends to concentrate power over reorganizations in the Company, in parent holding companies and in holders of large blocs of shares,

who in many cases will be in no position to press the interests of small shareholders or of widely held issues. In cases of such complexity as corporate reorganizations, such procedure can only hamper the effectiveness of the Commission itself in determining what is a fair and equitable plan. The point has been persuasively stated as follows:

> "Under former Sec. 77B the theory grew up that 'benefit to the estate' generally meant activities which related to the successful consummation of a plan. But opposition to a plan, even though unsuccessful, may be both desirable and beneficial, and aggressive action by minority groups is sometimes necessary against entrenched interests who wish to dominate the reorganization for their own advantage." (Emphasis added). Collier on Bankruptcy, Vol. 6, p. 4537.

It is submitted that a proper rule will give due regard to the importance of ensuring adequate representation of all classes of publicly held shares. Furthermore, the "benefit rule" marks an attempted return to unprofessional standards, putting the Committee attorney and expert in the position of working for contingent fees. The rationale of the rule—namely that the work of professional men is of little or no value unless the patient is cured or the case won—is outmoded and inducive of inferior professional standards.

Conclusion.

It is submitted that this case presents an important question of Federal law which has been applied inconsistently by the Circuit Courts and the Commission itself. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix A

The following figures, except as adjusted for change of current values, were submitted to the Courts below. The figures previously submitted have never been challenged by the Commission. They demonstrate that the approval of the Plan or Reorganization of Electric Power and Light Corporation unfortunately demolished a large portion of the value of the common shareholders equity in the company. The figures below are derived from prices quoted on the New York Stock Exchange of which the Second Circuit takes judicial notice, *Park & Tilford* v. *Schulte* 160F 2d. 984, 990.

The Plan of Reorganization provided for the following allocations of securities to each share of the preferred stocks (Opinion re Plan, p. 7 Unprinted Record, Vol. I, p. 105):

$7 Preferred Stock	6.5 shares of United Gas Corp.
	4.5 shares of Middle South Utilities
$6 Preferred Stock	5.9 shares of United Gas Corp.
	4.1 shares of Middle South Utilities
$7 Second Preferred Stock	6.25 shares of United Gas Corp.
	4.3 shares of Middle South

Current quotations on the New York Stock Exchange show that United Gas Corporation and Middle South Utilities are selling at about the same price as that prevailing at the time of the Committee's petition for rehearing to the Court below. United is selling for about $30.00 per share and Middle South for about $28.00 per share. (See, for example, quotations in New York Times, Sunday, June 13, 1954).

In the following table are listed the total claims of the various Preferred Stocks, the valuation of them by the Commission and the present range of error of the Commission.

	(Total Claim Liquidation and Redemption Values)	*Valuation of Claim Adopted by Commission*
$7 Preferred	$189.71 and $199.71	$185.00
$6 Preferred	$176.90 and $186.90	171.00
2nd Preferred	$212.00 and $217.00	185.00

	Present Value of Securities Allocated, Per Share
$7 Preferred	$321.
$6 Preferred	$291.
2nd Preferred	$307.9

	Range of Error Per Share in Valuation	*Approx. total range of Error in Valuation*
$7 Preferred (514,162 shares)	$120 to $136!	$61,700,000 - $69,900,000
$6 Preferred (225,430 shares)	$104 to $120!	$23,445,000 - $27,100,000
2nd Preferred (74,814 shares)	$ 91 to $123!	$ 6,800,000 - $ 9,200,000
	Total error	$91,945,000 - 106,200,000

It is therefor apparent that the preferred stocks received from 90 to 105 million dollars in excess of their claims. This was all at the expense of the common stock and the stock warrants (which represent a very small percentage of equity); it is clear that the allocation to the common stock should have been doubled and was inadequate by 90 to 105 million dollars.

Although it is not the function of this Appendix or Brief to analyze fully the results of the plan, nevertheless, if review of this case were to be granted, the Committee would point out to this Court the following:

1. The Plan proposed by the Committee and rejected as unfair by the Commission has proved to the

fairest presented and strikingly close to actual performance.

2. The analyses of Peterson and the Committee, rejected in detail by the Commission in its opinion approving the plan, have unquestionably been proved to be sound.

3. The Commission's method of evaluation and the evaluations themselves have been completely incorrect.

Appendix B

PUBLIC UTILITY HOLDING COMPANY ACT—SECTION 11(e)

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate, the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the Company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."